Supreme Court, U.S.
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No. ———

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

FLORIDA SEED COMPANY, INC., *et al.*,
*Petitioners,*

v.

MONSANTO COMPANY,
*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does a distributor terminated by its supplier have antitrust standing where the distributor has alleged a refusal to deal having a collateral anticompetitive purpose to monopolize the relevant market, and where the supplier's refusal to deal follows its acquisition and temporary control of a competing brand?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the United States Court of Appeals for the Eleventh Circuit and herein include the following:

Petitioners

Florida Seed Company, Inc.
Frit Industries, Inc.

Respondent

Monsanto Company

## RULE 29.6 DISCLOSURE

Petitioners are wholly-owned subsidiaries of Frit, Inc.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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Florida Seed Company, Inc. ("Florida Seed") and Frit Industries, Inc. ("Frit") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

### OPINIONS BELOW

The February 18, 1997 opinion of the court of appeals (App. A) is reported at 105 F.3d 1372. The November 9, 1995 Memorandum Opinion and Order of the court of original jurisdiction, the United States District Court for the Middle District of Alabama, Northern Division (App. B), is reported at 915 F. Supp. 1167.

### JURISDICTION

The court of appeals rendered its decision on February 18, 1997. Rehearing on the February 18, 1997 judgment

was denied on April 24, 1997. (App. C). On May 7, 1997, the court of appeals issued its mandate. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2 (App. D).

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a) (App. E).

## STATEMENT OF THE CASE

1. *Factual Background:* This case presents a situation in which a manufacturer—Monsanto Company ("Monsanto")—with market power in the market for residential non-selective herbicides (weed killers) attained temporary control over a competing brand of its primary competitor and used that control in order to further monopolization and attempted monopolization of the relevant market. It was during this period of simultaneous control over competing brands that Monsanto terminated Florida Seed as a distributor of the temporarily controlled brand in order to effectuate Monsanto's plan to monopolize the relevant market.

According to Petitioners' complaint (the "Complaint"),[1] a critical step in Monsanto's scheme involved the manipulation of lawn and garden product distribution channels by terminating the long-standing distribution rights of Florida Seed and other distributors like Florida Seed. R1-1-19.[2] Monsanto targeted Florida Seed for elimination—not because it was a weak or ineffective distributor, but because it was a strong and effective distributor of the products Monsanto desired to cripple. R1-1-17.

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[1] For purposes of reviewing the Rule 12(b)(6) dismissal of Petitioners' antitrust claim, the factual allegations of the Complaint must be taken as true. *Albright v. Oliver*, 510 U.S. 1215 (1994).

[2] "R" refers to the record maintained by the clerk of the district court.

Florida Seed is engaged in the marketing and wholesale distribution of lawn and garden products. R1-1-1. Frit engages in the development and manufacture of certain lawn and garden products. R1-1-2. Frit is also the guarantor of certain debt allegedly owed to Monsanto from Florida Seed, which debt was the subject of a counterclaim by Monsanto in the court below. R1-1-16.

The termination of Florida Seed's distributorship followed the 1993 acquisition by Monsanto of the Ortho Consumer Products Division of Chevron Corporation ("Ortho"). R1-1-14. Both before and after that acquisition, Monsanto manufactured and sold a diversified line of chemicals, including agricultural chemicals. R1-1-2. Perhaps the best known of these chemicals is the leading residential non-selective herbicide known as "Roundup." R1-1-3.

*Monsanto maintains market power in the relevant market.* Among other claims, the Complaint in this action charges that Monsanto terminated Florida Seed's distributorship as a crucial step in a pattern of conduct constituting monopolization and attempted monopolization of the relevant market in violation of Section 2 of the Sherman Act. R1-1-18, 19. According to the Complaint, the relevant product market is the residential non-selective herbicide market, which includes "the manufacturing and formulation of non-selective herbicides as well as the *marketing* and *selling* of non-selective herbicide products for residential use in the control of brush, plants, weeds and grass." R1-1-2, 3. The Complaint identified the geographic market as the United States. R1-1-3. Monsanto's Roundup product was and is the dominant residential non-selective herbicide sold in the United States. R1-1-4.

Until the consummation of Monsanto's purchase of the Ortho assets in 1993, Ortho independently produced a residential non-selective herbicide ("Kleenup") that competed directly with Roundup. R1-1-3. Together, Mon-

santo's Roundup and Ortho's Kleenup comprised 85% of the relevant market for residential non-selective herbicides immediately prior to Monsanto's acquisition of Ortho in 1993. R1-1-4. Prior to the acquisition, Roundup enjoyed approximately 63% of the market and Kleenup enjoyed approximately 22% according to the Federal Trade Commission ("FTC"). R1-1-4. Barriers to entry into the highly concentrated residential non-selective herbicide market include high capital costs of product development, high marketing costs required to combat the market strength and brand identity of existing products, and Monsanto's patent protection over glyphosate, the key ingredient in both Roundup and Kleenup. R1-1-3, 4.

*Monsanto's acquisition of Ortho's assets raised suspicions of the FTC, which required divestiture of the Kleenup Assets.* Monsanto acquired the assets of Ortho in May, 1993, but only after the entry of a consent decree ("Consent Decree") settling charges filed by the FTC alleging that the acquisition would (i) substantially lessen competition or tend to create a monopoly in the residential non-selective herbicide market, (ii) increase Monsanto's ability unilaterally to exercise market power in that market, (iii) increase the already high concentration in the market, (iv) raise barriers to entry into the market and (v) eliminate Ortho as an independent competitive force in the market. R1-1-7. The Consent Decree required, among other things, that Monsanto divest itself of certain assets acquired from Ortho relating to the Kleenup product. R1-1-7. The Consent Decree gave Monsanto until September 30, 1994 to sell the following assets: [3] (i) the chemical formulation for Kleenup, (ii)

[3] As noted by the district court, Monsanto had not divested the Kleenup Assets at the time the Petitioners filed their Complaint in this case. The FTC approved the divestiture of the Kleenup Assets to Platte Chemical Company ("Platte") in September of 1994. R1-25-6. The record is otherwise silent concerning the background and capabilities of Platte or the results of its efforts to market Kleenup following divestiture. Nonetheless, Petitioners expect that,

the Kleenup product name trademark and (iii) a specified quantity of Ortho's glyphosate inventory (the "Kleenup Assets"). R1-1-7. The Consent Decree also required Monsanto to maintain the marketability and viability of the Kleenup Assets until such time as the divestiture was complete. R1-1-7.

*Monsanto terminated Florida Seed as a distributor of a product over which Monsanto had only temporary control.* For many years before Monsanto acquired the assets of Ortho, Florida Seed served as a distributor for the lawn and garden products of both Monsanto and Ortho, including Roundup and Kleenup. R1-1-10. Florida Seed operated as a Monsanto distributor pursuant to a series of Lawn and Garden Products Distributor Agreements, which were, by course of dealing, renewed annually until 1992. R1-1-10. By letter dated July 1, 1992, Monsanto informed Florida Seed of its intention to end their business relationship effective as of September 30, 1992. R1-1-13. Based on the correspondence received by Florida Seed from Monsanto, the decision to end Florida Seed's distributorship of Roundup and other Monsanto products was not based on Florida Seed's performance but on a "strategic decision" to use fewer authorized distributors. R1-1-13. Florida Seed urged Monsanto to reconsider this decision but took no legal action on account of it.

Florida Seed also served as an Ortho distributor for many years pursuant to a series of Wholesale Distributor Agreements between the two parties. R1-1-10. The parties to these Ortho distribution agreements renewed them annually by course of dealing, often not actually executing a contract until several months into a new annual period,

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with the benefit of discovery, they will be able to demonstrate that Platte has been dramatically less successful than Ortho had been in selling Kleenup in the residential lawn and garden products marketplace—largely because they lack effective product distribution channels in that marketplace.

and, in some instances, not executing a new contract at all. R1-1-10, 11. A few months before the purchase of Ortho's assets by Monsanto, Ortho completed phase one of what it termed its "Distributor Rationalization Program," which involved an assessment of each of its distributors' strategic direction, long-term financial stability, and relationships with Ortho and major retailers. R1-1-13, 14. Ortho later announced that it would enter the distribution level of the market by making direct sales to certain large retail chains. Thereafter, Ortho maintained a system of dual distribution. R1-1-14. As a result of this program, Ortho eliminated approximately thirty of its distributors during 1992 and early 1993, but retained Florida Seed. R1-1-14. Because Ortho and, subsequently, Monsanto were involved in both manufacturing and distribution, Florida Seed was both a customer and competitor of these entities.

As a result of Monsanto's acquisition of the Ortho assets and during the interim period Monsanto was given to divest the Kleenup Assets, Monsanto absolutely controlled the interbrand competition between Roundup and Kleenup. R1-16-4. By virtue of Monsanto's prior termination of Florida Seed's rights to distribute Monsanto's brand of products, including Roundup, Florida Seed had only one residential non-selective herbicide to sell—Ortho's Kleenup. R1-1-17. It was during the period of time in which Monsanto controlled both Roundup and Kleenup that Monsanto terminated Florida Seed as a distributor of Ortho products, including Kleenup, with an effective date of September 30, 1993. R1-1-15.

In the monopolization and attempted monopolization count of the Complaint, Petitioners alleged that as an integral part of a pattern of conduct calculated to preserve its market dominance, the defendant "embarked on a campaign to diminish the value of the Kleenup Assets required to be sold under the FTC consent order." R1-1-18, 19. The Complaint specifically alleged that Monsanto manipulated both the promotion of Roundup in

relation to Kleenup and "the distribution channels for Kleenup, to assure that the Kleenup product [lost] market share during the period of transition contemplated by the FTC order." R1-1-19. The Complaint further alleged that (i) Monsanto abruptly altered long-standing distribution patterns by terminating Florida Seed, (ii) Monsanto's claimed "strategic decision to use fewer distributors" was merely "pretextual," (iii) Monsanto terminated Florida Seed because Florida Seed was an effective and capable distributor of Kleenup at a time when promotion of Kleenup was at odds with Monsanto's intention to "cripple Kleenup," and (iv) that other Kleenup-only distributors were likewise terminated by Monsanto during this same time period. R1-1-17, 18, 19.[4]

2. *Proceedings Below:* On May 2, 1994, Petitioners commenced this action against Monsanto in the United States District Court for the Middle District of Alabama, Northern Division. R1-1. The Complaint asserted violations of Section 2 of the Sherman Act and other federal antitrust laws, as well as various state law claims. Monsanto filed a rule 12(b)(6) motion to dismiss all of Petitioners' federal antitrust claims on the sole ground that Petitioners lacked standing to assert those claims. R1-5. Florida Seed attempted to initiate discovery in the district court but never succeeded in obtaining production of documents or depositions in support of its antitrust claims. Eventually, Florida Seed's motion to compel was dismissed as moot and discovery was stayed. Thus, the

[4] The decision below leaves the mistaken impression that Florida Seed raised these antitrust claims only after Monsanto demanded payment on disputed commercial accounts. (8a). Although the point should be irrelevant to the standing issue in any event because it goes to the substance of the claim rather than the search for the proper plaintiff, the antitrust concerns of Florida Seed *were* expressed to Monsanto long before the disputed accounts arose. If the facts had been developed below, they would have shown that Florida Seed first raised its antitrust concerns in an August 20, 1993 letter —several months before the accounts receivable arose and many months before Monsanto demanded payment.

record before the district court essentially was limited to the text of the Complaint.

On November 9, 1995, the district court issued a memorandum opinion and order granting Monsanto's motion to dismiss the federal antitrust claims under Section 2 of the Sherman Act and Section 7 of the Clayton Act. (App. B). On January 17, 1996, the district court entered a final judgment granting Monsanto's motion to dismiss Petitioners' federal antitrust claims. R1-30. Petitioners timely filed a notice of appeal from the district court's order granting the defendant's motion to dismiss. R1-31. On February 18, 1997, the United States Court of Appeals for the Eleventh Circuit issued an opinion affirming dismissal of Petitioners' antitrust claims. (App. A). On March 11, 1997, Petitioners filed a Petition for Rehearing and Suggestion of Rehearing *En Banc*, which was denied on April 24, 1997. (App. C).

## REASONS FOR GRANTING THE WRIT

### I. THE ELEVENTH CIRCUIT'S OPINION CONTRAVENES SUPREME COURT PRECEDENT.

*The Eleventh Circuit opinion improperly creates a black-letter rule of antitrust standing.* The Eleventh Circuit's decision erroneously creates a black-letter rule denying antitrust standing for distributor terminations—even where those terminations are part of a deliberately anticompetitive scheme by a firm with monopoly power—so long as the termination follows a merger or acquisition by the supplier. (6a) ("distributors who are terminated following a merger suffer no antitrust injury"). This Court's precedents have long recognized that although a manufacturer generally may deal with whom it pleases, it may not refuse to deal where it has a collateral anticompetitive purpose to create or maintain a monopoly. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 624 (1953) ("If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or

market control, even individual sellers' refusals to deal have transgressed the [Sherman] Act."). *See also, Lorain Journal v. United States*, 342 U.S. 143, 155 (1951) (right of individual seller to refuse to deal not absolute). This line of authority has its roots in *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

Aside from contravening this well-established authority, the rule announced by the Eleventh Circuit in this case would represent bad policy by granting *carte blanche* for suppliers with market power to disrupt distribution channels for anticompetitive reasons. This Court has expressly cautioned against using such inflexible rules to decide questions of antitrust standing. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536 n.33 (1983) (directing courts to "analyze each situation in light of the factors set forth in [that case]"). Indeed, the Eleventh Circuit's use of an inflexible standard in this case directly contradicts this Court's admonition in *Associated General* that a black-letter rule of antitrust standing is "virtually impossible" to develop. *Id.* at 536.

*The Eleventh Circuit's opinion improperly limits the broad objectives of the antitrust laws.* This Court has steadfastly "refused to engraft artificial limitations on the [Clayton Act] § 4 remedy," *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982), and has recognized that those remedial provisions serve both to deter antitrust violators and to provide remedies for those victimized by antitrust violations. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). The Court further has cautioned against narrow interpretations that will limit these broad objectives. *McCready*, 457 U.S. at 477. The Eleventh Circuit's opinion in this case creates an artificial limitation on antitrust remedies that would limit the broad objectives of the antitrust laws by holding that distributors who are terminated following a merger or acquisition necessarily lack antitrust standing whether or not their termination results from unlawful anticompetitive conduct.

The Eleventh Circuit also engrafted artificial limitations on the Clayton Act Section 4 remedy, in effect requiring that Florida Seed complain of higher prices. (6a). Such a requirement is not found in relevant jurisprudence. Instead of narrowing its focus on whether Florida Seed complained of higher prices, the court should have considered whether Florida Seed's interests are aligned with those of the ultimate consumer. Perhaps the Eleventh Circuit's difficulty with this point stems from its failure to recognize that Petitioners' interests are aligned with those of the ultimate consumer and, indeed, that Florida Seed itself was a consumer.

The Eleventh Circuit's requirement that a party alleging monopolization must complain of higher prices contradicts the clear intent of this Court in *McCready*. *See* 457 U.S. at 482-83 (price is not the only form of remedial injury). The Eleventh Circuit's standard also fails to take account of the antitrust laws' deterrent effect in addition to their remedial effect. *Illinois Brick*, 431 U.S. at 746. Furthermore, such a narrow rule would undermine other established Supreme Court decisions such as *Pfizer Inc. v. India*, 434 U.S. 308 (1978) (foreign state could bring a treble damage action in a U.S. court because "[t]reble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers"). Based upon the Eleventh Circuit's rationale, *Pfizer* was wrongly decided because a suit by a foreign state could not have made ultimate consumers in the United States whole from the damages they suffered through paying higher prices. In many instances, a distributor's interests may be aligned with, and closely resemble, those of the ultimate consumer. *See Illinois Brick*, 431 U.S. at 740-41 ("in suits by direct purchasers or middlemen, the interests of ultimate consumers are similarly implicated"). In like manner, the interests of Florida Seed are aligned with those of ultimate consumers: Florida Seed's distribution of Kleenup promoted

competition by serving as a competitive counterweight to Roundup, and the weakening of that counterweight disserved the interests of consumers.

*Florida Seed's injuries amounted to antitrust injuries because they were the type injuries that Monsanto's antitrust violations likely would cause. McCready* is particularly instructive in the present situation, for the Court there determined that the harm to McCready, like that to Florida Seed, "was a necessary step in effecting the ends of the alleged illegal conspiracy." *Id.* at 479. As in *McCready,* the harm to Florida Seed was both necessarily foreseeable and inextricably intertwined with the lessening of competition brought about by Monsanto. Monsanto terminated Florida Seed to weaken the Kleenup brand, and to assure that competition in the market for residential non-selective herbicides would be dampened even after Monsanto divested itself of the Kleenup Assets. If the authority of *McCready* still stands, then Florida Seed's allegations that it was injured as a necessary step in effecting illegal monopolization must state valid antitrust injuries.

The claim before the Eleventh Circuit was based on a refusal to deal or market exclusion by Monsanto. As noted by this Court, "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 125 (1969) (allegations of plaintiff's decreased market share reflected "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause"). Like Zenith, Florida Seed suffered the types of loss that such anticompetitive activities likely would cause—the decline in sales and profits—and these losses arose directly from the weakening of competition in the relevant market.

The Eleventh Circuit's determination that Petitioners are "not complaining about higher prices," (6a), misses

the mark and is squarely at odds with established Supreme Court precedent. "[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise or to exclude competition when it is desired to do so." *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946). Petitioners asserted in their Complaint that "[a]t all times relevant to this action, Monsanto has . . . possessed the power to control price and exclude competition in the relevant market." R1-1-10. If the Kleenup brand has been weakened through selective curtailment of Kleenup's distribution channels, Monsanto's ability to obtain supracompetitive pricing for Roundup has been enhanced. This enhancement of market power has occurred at the expense of Florida Seed, and exclusion of Florida Seed from the market was the means by which Monsanto's control over the market was strengthened.

The Eleventh Circuit's decision in this case also conflicts with this Court's rationale in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 n.14 (1977) (plaintiffs need not "prove an actual lessening of competition in order to recover"). The petitioners in *McCready* misread this Court's opinion in *Brunswick* and the Eleventh Circuit did likewise in this case. While the petitioners in *McCready* argued that McCready's injury " 'did not reflect the anticompetitive effect' of the alleged violation," 457 U.S. at 482, this Court held that "Brunswick is not so limiting." *Id.* In so holding, this Court recognized that "a [Clayton Act] § 4 plaintiff need not 'prove an actual lessening of competition in order to recover.' " *Id.* Accordingly, "while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress, . . . that is not the only form of injury remediable under § 4." *Id.* at 482-83 (internal citations omitted). Thus, the Eleventh Circuit's assertion that

Florida Seed had suffered no antitrust injury because it was not complaining of higher prices runs afoul of clear guidance from this Court.

The Eleventh Circuit's statement that Florida Seed did not complain about injury to competition but about injury to itself cannot be reconciled with the allegations of the Complaint. Like the plaintiff in *McCready*, Florida Seed does not complain of the effects of increased competition. To the contrary, Florida Seed alleges a decrease in competition in the residential non-selective herbicide market brought about in large measure by the actions of Monsanto toward Florida Seed. Petitioners' Complaint plainly stated:

> Among other things, [Monsanto] has manipulated and continues to manipulate the promotion of Roundup in relation to Kleenup, as well as the distribution channels for Kleenup, to assure that the Kleenup product loses market share during the period of transition contemplated by the FTC order. As part of these efforts, Monsanto abruptly altered long-standing distribution patterns when it terminated Florida Seed's distributorship on the pretext of a strategic decision to use fewer distributors. In fact, Monsanto terminated Florida Seed because it recognized that Florida Seed would vigorously promote Ortho products (including Kleenup) during a period when such promotion was not consistent with Monsanto's plan to cripple Kleenup.

R1-1-19. The Eleventh Circuit failed to appreciate how the injury to Florida Seed was intertwined with, and a primary cause of, the injury to competition in the relevant market. If the theory of the Complaint is correct (and at this point it must be taken to be), the diminution in interbrand competition between Roundup and Kleenup and Florida Seed's losses both trace back to Florida Seed's termination as an Ortho distributor. As pled, Florida Seed's injuries coincided directly with "the public detri-

ment tending to result from the alleged violation," *see Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1450 (11th Cir. 1991), because they flowed from the very aspect of Monsanto's conduct that, over time, is likely to increase price and restrict consumer choice.

*The Eleventh Circuit's use of a black-letter rule of antitrust standing prevented it from appreciating that Monsanto's anticompetitive actions against Florida Seed impaired interbrand competition.* In its zeal to fashion an inflexible rule that no distributor has standing to challenge its exclusion from the market following a merger or acquisition, the Eleventh Circuit either misread Petitioners' Complaint or failed to recognize the significance of its allegations.[5] The court below never appreciated that Monsanto had only temporary control over the Kleenup Assets or that Florida Seed was both a consumer of Kleenup and, because Monsanto engaged in dual distribution, a competitor of Monsanto. Monsanto's conduct directly affected *interbrand* competition: it terminated Florida Seed in order to disrupt the Kleenup distribution channels and thereby weaken the Kleenup product with

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[5] The antitrust laws are primarily concerned with the protection of interbrand competition. *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). It is precisely this effect on interbrand competition that has made the Department of Justice wary of nonprice vertical restraints that allow a manufacturer to restrain interbrand competition by closing off efficient distribution channels to its competitors. *See* Rebecca P. Dick, Chief of Civil Task Force of the Department of Justice, Antitrust Division, *Remarks to American Bar Association Section of Antitrust Law and the Corporate Bar Association of Westchester and Fairfield*, 67 ANTITRUST & TRADE REG. REP. 637 (Dec. 1, 1994). Florida Seed's injuries arose in just such a setting and termination of Florida Seed was Monsanto's means of restraining interbrand competition by closing off efficient distribution channels to its competitors. In effect, the actions taken by Monsanto during its temporary control of two brands of residential non-selective herbicides were more akin to a horizontal restraint of trade than the vertical ones that are often scrutinized by the Justice Department.

which it would have to compete after divestiture. The Eleventh Circuit viewed the case as one seeking to challenge an unlawful merger when that issue was not before it. (5a-6a) (citing *Brunswick* regarding the objective in preventing mergers and explaining how distributors terminated following a merger have not suffered antitrust injury because their injuries "[do] not flow from that which makes a *merger* unlawful" (emphasis added)). Monsanto's acquisition of Ortho is not at issue here, and Florida Seed did not appeal the district court's denial of standing under Section 7 of the Clayton Act. The acquisition is relevant only because it set the stage for Monsanto's subsequent manipulation of interbrand competition. Monsanto's anticompetitive actions following the acquisition are in issue.

## II. THE ELEVENTH CIRCUIT'S DECISION CONTRADICTS ITS OWN PRECEDENT.

*Earlier Eleventh Circuit decisions acknowledge that a refusal to deal in order to monopolize is actionable.* A refusal to deal coupled with a collateral anticompetitive purpose violates Section 2 of the Sherman Act. In *Universal Brands, Inc. v. Philip Morris Inc.*, 546 F.2d 30 (5th Cir. 1977), a decision relied upon both by Monsanto and the Eleventh Circuit, the former Fifth Circuit recognized that a manufacturer's right to choose to whom it will sell is far from absolute. "If the refusal to deal is a device used to acquire a monopoly . . . or to establish market dominance and drive out competition . . . it is illegal." *Id.* at 33. That is exactly what the Complaint alleges here. *See* R1-1-17, 18 & 19. The Eleventh Circuit's decision in this case to deny standing to a distributor victimized by a refusal to deal whenever a merger or acquisition preceded the refusal, even where the maintenance or enhancement of market dominance was intended, nullifies the rule of law set forth in *Universal Brands.*

Under the Eleventh Circuit's approach, an excluded distributor could never allege antitrust injury based on the loss of a distributorship. Such a rule does not comport with other decisions of that court. *See, e.g., DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993), *amended* 997 F.2d 1340, *cert. denied*, 510 U.S. 1012 (1993) (terminated distributor granted standing). Like the plaintiff in *DeLong*, Petitioners here complain of a defendant taking advantage of a short-term position (control over both Roundup and Kleenup) in order to effectuate a long-term anticompetitive purpose (monopolization). Like the plaintiff in *Delong*, Florida Seed's injury was a loss of the opportunity to compete. *See id.* at 1198. In contrast to the Eleventh Circuit's assertion that Florida Seed suffered no antitrust injury—merely injury to itself—the court in *DeLong* noted that the distributor "sustained antitrust injury by loss of its . . . distributorship and consequent loss of sales and profits." *Id.* at 1199. It would be incongruous, at best, to hold that excluded distributors suffer no antitrust injury if their exclusion follows a merger, even where that exclusion resulted from a collateral anticompetitive purpose. *DeLong* teaches otherwise by holding that loss of the opportunity to compete may constitute antitrust injury.

*DeLong* is by no means unique. The Eleventh Circuit previously has "found antitrust standing on behalf of a victim of a refusal to deal that was designed to have an anticompetitive effect on the relevant market." *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1522 (11th Cir. 1990), *cert. denied*, 502 U.S. 815 (1991), *citing Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752 (11th Cir. 1983). Like Monsanto, the defendant in *Construction Aggregate* participated in two sectors of the relevant market—the aggregate production and the aggregate hauling sectors. The refusal to deal affected not only

the hauling sector (akin to distribution in this case) in which the plaintiff competed with the defendant, but also the aggregate production market. The Eleventh Circuit refused to establish a rule of law "that only one discrete sector of a market may be the target for a particular anti-competitive act." 710 F.2d at 764. Relying on *McCready*, the *Construction Aggregate* court ruled that even if the defendant aimed its conduct most directly at the production sector, "[it] must have foreseen that the direct effect of such a restraint would be to eliminate an innovative competitor from the field of aggregate hauling." *Id.* at 765. Ultimately, the *Construction Aggregate* decision upheld the hauler's antitrust standing, as well as its claims for damages based on lost profits. *Id.* at 786 (lost profits proper measure of competitive injury in market exclusion cases).

*The Eleventh Circuit's opinion violates its own admonition not to convert a determination of antitrust standing into a trial on the merits.* The Eleventh Circuit's denial of standing may be traceable to a misplaced skepticism regarding Florida Seed's substantive claim under Section 2 of the Sherman Act. (8a) ("Simply put, this is not an antitrust case but rather a breach of contract case.") The court's consideration of the merits of the Petitioners' substantive claim upon a motion to dismiss for lack of standing clearly violated its earlier statement in *Construction Aggregate*:

> Ultimate proof of injury in fact is not required in order for a plaintiff to have standing to sue. *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d at 1360 n.6. Otherwise, preliminary litigation over the threshold question of standing would result in a "trial on the merits."

*Construction Aggregate*, 710 F.2d at 763 n.24. Thus, the Eleventh Circuit in *Construction Aggregate* sought to avoid trying issues of fact in order to answer the threshold question of standing. The court's concluding remarks

strongly suggest that its apparent black-letter standing rule was announced because the court thought Petitioners' claims were "not antitrust [claims]," not because Petitioners were the wrong party to assert them.

In its opinion, the Eleventh Circuit cited with approval from a law review article that the court read as suggesting "per se legality" for a manufacturer's vertical integration into distribution. (6a) (citing Kenneth L. Glazer and Abbot B. Lipky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act,* 63 ANTITRUST L.J. 749 (1995)). The Eleventh Circuit's citation is telling because the referenced article is not about antitrust standing at all—it discusses the *substantive* standard that should govern a monopolist's liability for refusal to deal. If the Eleventh Circuit assumed there was no valid antitrust claim as part of its antitrust injury analysis, its approach was flawed.[6]

Equally as important, however, the article cited by the Eleventh Circuit recognizes certain "exceptional" circumstances in which a monopolist's efforts at vertical integration would be anticompetitive, and this case squarely fits one of those circumstances. According to the article, "circumstances are few when a monopolist can prevent attacks on its fundamental monopoly by tying up and thereby cutting off all available routes for distribution of a competitor's products." *Id.* at 780. Yet this is exactly what Florida Seed alleges in the instant case. The author's conclusion regarding vertical integration cases is based on the assumption that "interbrand competition cannot be affected" by reconfiguration of distribution for a *single* brand of product. *See id.* at 788. Often this may be true, but in this case Monsanto temporarily controlled

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[6] The Eleventh Circuit's view of Florida Seed's antitrust claim ignores the Supreme Court's admonition that antitrust standing must be tested assuming that plaintiff "can prove the facts alleged in . . . [the complaint]." *Associated General,* 459 U.S. at 526; *see also, Construction Aggregate,* 710 F.2d at 764.

*both* non-selective herbicide brands; accordingly, interbrand competition *was* adversely affected by Florida Seed's exclusion from the market. Other decisions of the Eleventh Circuit have recognized the validity of such a claim under Section 2: "[a] Section 2 claim can be supported by limiting the market definition to a single level of distribution where a vertically integrated manufacturer uses his dominant position at one level of competitive activity (manufacturing) to eliminate competition at another level (retailing)." *Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp.*, 849 F.2d 1336, 1345 (11th Cir. 1987). It is at least ironic that the article cited by the Eleventh Circuit used the Eleventh Circuit's decision in *Ad-Vantage* to illustrate courts' "considerable difficulty" with monopolization cases involving vertical integration into distribution, *see* 63 ANTITRUST L.J. at 787 & n.156, but even the authors of that article recognize that where unusual circumstances suggest that interbrand competition is jeopardized, Section 2 liability is appropriate in a vertical integration case. The Eleventh Circuit's reliance on an article concerning the substance of Petitioners' Section 2 claim was wrong in the first instance, but the court compounded its error by misreading the article.

The rationale of the Eleventh Circuit also evidences that it has and, if unchecked, will continue to make factual assumptions reaching the merits of a case in order to create rigid rules of antitrust standing. As noted above, the court's decision below indicates that it assumed, without the benefit of any discovery, that Petitioners' substantive antitrust claim lacked merit. Moreover, in the face of allegations in the Complaint to the contrary, the Eleventh Circuit assumed that Florida Seed was a distributor terminated for efficiency following a merger; the court refused to consider the possibility (alleged in the Complaint) that the distributor termination here was part of a collateral anticompetitive plan on Monsanto's part. (6a). The Eleventh Circuit simply sought to categorize this case so that it could apply a rigid rule of standing.

This case represents only the latest example of the Eleventh Circuit's misguided approach to antitrust standing using inflexible rules. Professors Areeda and Hovenkamp criticized the Eleventh Circuit's earlier decision in *Todorov* for its unwarranted assumption regarding the motives of a plaintiff seeking to join an exclusive venture. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 373'e3 (Supp. 1997). Like this case, *Todorov* was a market exclusion case. Areeda and Hovenkamp noted that the plaintiffs' motives in a case such as *Todorov* may have fallen into one of two categories, yet the Eleventh Circuit assumed a motivation that would deny antitrust standing to the plaintiffs. *Id.*[7] In like manner, the Eleventh Circuit has assumed in this case that all post-acquisition dealer terminations are efficiency-driven and fashioned a blanket standing rule around that premise.

## III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

*The Eleventh Circuit's opinion conflicts with authority that the entity which is harmed in order to reduce competition suffers antitrust injury and has standing.* As stated by the Eighth Circuit, a number of "cases plainly teach that a business, especially one with a large degree of market power, may violate Section 2 of the Sherman Act if it exercises its power to deal with others, *including its own distributors*, in a manner which is designed to

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[7] As one might expect, the Eleventh Circuit's tendency to fashion inflexible rules of antitrust standing has infected the district courts in this circuit. For example, Areeda and Hovenkamp have referred to a recent ruling in which a district court "incorrectly concluded" that a plaintiff wished to join an exclusive arrangement when, in reality, the plaintiff sought to disrupt the exclusivity. *See id.*, citing *Atlanta Pulmonary Diagnostic Clinic v. Haynes*, 1995-2 Trade Cas. ¶ 71,245 (N.D. Ga. 1994).

unreasonably restrain trade." *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987) (emphasis supplied), *citing Times-Picayune Publishing, Lorain Journal, Colgate, Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1300 (9th Cir. 1978) and *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, 38-39 (D. Minn. 1945). Although a manufacturer generally may deal with whomever it chooses to distribute its products, courts have recognized that this right is not unrestricted. A manufacturer may not lawfully terminate distributors at will if "the manufacturer attempts to exact some collateral anticompetitive advantage." *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1030 (2nd Cir.), *cert. denied* 444 U.S. 917 (1979) (acknowledging that a Sherman Act Section 1 violation arises where a manufacturer seeks such a collateral anticompetitive purpose). *See also, Hewlett-Packard Co. v. Arch Associates Corp.*, 908 F. Supp. 265, 269 (D. Pa. 1995), *citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760 (1984). This principle applies even where a manufacturer has a legitimate natural monopoly over its products. *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110, 121 (E.D.N.Y. 1976). Of course, the facts of this case present the additional element of Monsanto's temporary control not only of its products, but also the products of another brand.

Like Florida Seed, the plaintiff in *Hartz* was a distributor terminated by a manufacturer that was dominant in the relevant market. As in this case, the plaintiff was both a competitor of its supplier and a consumer of its products. The distributor's relationship with its supplier in *Hartz* deteriorated as a result of the distributor's distribution of products that competed with the supplier's products. As a result of the termination of the plaintiff's distributorship, the plaintiff lost approximately one-half of its original customers, many of whom were its largest accounts.

The reasoning of the court in *Hartz* strongly supports Florida Seed's standing in this action. The *Hartz* court

noted that " 'an anticompetitive practice may have an economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal.' " *Id.* at 802, *quoting United States v. Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981). The *Hartz* court held that a jury reasonably could have concluded that the defendant manufacturer attempted to "achieve a monopoly by depriving the public of the advantages that flow from free competition." 810 F.2d at 802. In like manner, Monsanto has attempted to achieve or sustain a monopoly by depriving the public of the free flow of competition in the residential non-selective herbicide market. While the defendant in *Hartz* offered reasons for its termination of the plaintiff distributor, the court found that the defendant's reasons for terminating the plaintiff reasonably could have been pretextual and that the actions instead, "were specifically designed to destroy a perceived source of competition." *Id.* at 803-04. Here, the Complaint alleges that Monsanto's "strategic decision to use fewer distributors" was pretextual, and that Monsanto terminated Florida Seed as a Kleenup distributor not because of valid efficiency concerns, but rather to further Monsanto's anticompetitive attempt to weaken the Kleenup product, and thereby to weaken competition in the relevant market. R1-1-17 to -19.

Just as the court in *Hartz* found that a jury reasonably could have concluded that the defendant there set out to prevent the plaintiff distributor "from being a source of competitive pet products and to prevent [the plaintiff] from surviving as a financially stable distributor," a court reviewing the actions taken by Monsanto in relation to Florida Seed could (and should be afforded an opportunity to) reach a similar conclusion. *Id.* at 804. *Hartz* recognizes that a distributor may be targeted by a manufacturer or supplier of goods in order to weaken the competition supplied by another supplier or manufacturer and that such a distributor may successfully bring a monopolization claim. This method of causing harm to a distribu-

tor who also distributes competitive products not only results in direct injuries but also in antitrust injuries. Under the reasoning of *Hartz*, Florida Seed was both a consumer and a competitor of Monsanto in the relevant market alleged in the Complaint and had standing to bring an action against Monsanto under Section 2 of the Sherman Act.

The result in *Hartz* is supported further by the Eighth Circuit's subsequent decision in *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.d 211 (8th Cir. 1991). There the court noted that although both plaintiffs in the *Hartz* case were involved in the distribution of the defendant supplier's products, only one "was a distributor who bought and sold [the defendant's] products." *Id.* at 213. Noting that the distributor, and not the broker, was granted antitrust standing, the *S. D. Collectibles* court stated "that a broker, by contrast to a distributor, is not a consumer of the product marketed." *Id.* at 214. Thus, the Eighth Circuit reaffirmed its position from four years earlier that a distributor who buys and sells a manufacturer's products is a consumer of those products. According to Professors Areeda and Turner, "there is no doubt about the standing of the antitrust offender's immediate customer, whether or not that customer is an ultimate consumer or non-commercial entity." P. Areeda & D. Turner, *Antitrust Law* ¶ 337a at 183 (1978).[8] Florida Seed purchased products, including Kleenup, from Monsanto and then resold those products to retail accounts. As a purchaser of residential non-selective herbicides, Florida Seed was a consumer of Monsanto's residential non-selective herbicides, just as the plaintiff in *Hartz* was a consumer of its supplier's products. Similarly, Florida Seed suffered antitrust injury at the hands of its supplier and should have antitrust standing.

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[8] Professors Areeda and Hovenkamp have noted that while "no magic inheres in the 'consumer' label, it is always helpful to understand whether a plaintiff is complaining of an antitrust violation disrupting competition in a market in which he buys." P. Areeda & H. Hovenkamp, *Antitrust Laws* ¶ 337.1 at 428 (Supp. 1993).

*The Eleventh Circuit's opinion conflicts with decisions of other circuits that have found antitrust standing where the victim of a refusal to deal has alleged a collateral anticompetitive purpose.* Other Sherman Act precedent also supports a finding that Florida Seed has standing in this case. For example, the Tenth Circuit has held that where a complaint alleged more than a mere substitutition of distributors, a terminated distributor had standing to bring an action under Section 1 of the Sherman Act against a brewing company and its exclusive distributor. *Skyview Distrib., Inc. v. Miller Brewing Co.*, 620 F.2d 750 (10th Cir. 1980). The *Skyview* court recognized the general proposition that the mere substitution of distributors, absent a restraint of trade, does not violate the Sherman Act. *Id.* at 752. However, the complaint went beyond mere allegations of dealer substitution, alleging that the plaintiff "was 'eliminated' from the wholesale distributorship business, and competitors of [the defendant brewing company] were in fact unable to compete with [the defendant] in the local market." *Id.* The court thus held that because the complaint alleged more than mere substitution, it was "legally sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)." *Id.*

Similarly, the First Circuit granted standing to a terminated distributor pursuing claims under Sections 1 and 2 of the Sherman Act. *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied* 449 U.S. 890 (1980). The plaintiff distributor in *Bombardier* was terminated on the asserted ground that it defaulted under its distribution agreement. The plaintiff contended and the court found, however, that the plaintiff distributor was terminated because it got in the way of a scheme to allocate markets, an anticompetitive action. *Id.* at 13, 15. "[I]n order to accomplish the division of markets, it was necessary to deprive [the plaintiff] of the [relevant] product. . . ." *Id.* at 15. Because the distributor linked the defendants' anticompetitive behavior to its own injury resulting from termination, the court determined that the

case presented more than the mere switching of distributors. *Id.* Consequently, the court found that the plaintiff distributor suffered antitrust injury. *Id.*

Much the same as the plaintiffs in *Skyview* and *Bombardier*, Florida Seed has alleged that it was terminated by Monsanto because it stood in the way of an anticompetitive action—the weakening of the Kleenup brand and the reinforcement of Monsanto's dominance in the relevant market. As was true in *Bombardier*, in order to accomplish this anticompetitive goal, it was necessary to deprive Florida Seed of the crucial product, Kleenup. Thus, Petitioners have alleged the "something more" in relation to Monsanto's refusal to deal and would have standing under the views of the First, Eighth and Tenth Circuits.

## IV. THE ELEVENTH CIRCUIT'S USE OF THE DISCREDITED TARGET AREA TEST LEAVES A WRONG WITHOUT A REMEDY.

*The Eleventh Circuit clings to the discredited target area test.* While the Eleventh Circuit held that Florida Seed had not suffered antitrust injury and, consequently, it did not have to address the second prong of its antitrust standing analysis—whether the plaintiff is an efficient enforcer of the antitrust laws—it is curious to note that the Eleventh Circuit still maintains its use of the "target area test" which this Court expressly rejected in *Associated General*, 459 U.S. at 536 n.33. (4a) ("This [efficient enforcer] determination is predicated on the 'target area test.' "). The Eleventh Circuit gave no indication that it would consider all the factors outlined by this Court in *Associated General.*

*Florida Seed has standing under the test announced by this Court.* Analyzing the Complaint against the *Associated General* factors, as the courts below should have done, there is no doubt that Florida Seed is an efficient enforcer of the antitrust laws. First, Florida Seed has alleged a causal connection between Monsanto's antitrust

violation (monopolization or attempted monopolization) and harm to Florida Seed. R1-1-17, 18. In furtherance of Monsanto's effort to acquire or maintain its monopoly power in the residential non-selective herbicide market, Monsanto terminated Florida Seed as a distributor of Kleenup, thus preventing Florida Seed from selling Kleenup and resulting in multi-million dollar losses and loss of the ability to sell to large retail accounts. R1-1-18.

Second, Plaintiffs have alleged an intent by Monsanto to cause the harm. R1-1-18, 19 ("Monsanto terminated Florida Seed because it recognized that Florida Seed would vigorously promote Ortho products (including Kleenup) during a period when such promotion was not consistent with Monsanto's plan to cripple Kleenup."). Third, Plaintiffs have alleged a direct causal link between their injury and the market restraint. R1-1-17 ("It was not consistent with Monsanto's anticompetitive strategy to allow vigorous promotion of Kleenup at a time when Monsanto was de-emphasizing Kleenup and pushing Roundup. Florida Seed had proven to be a capable Ortho distributor and an independent force at the distributor level, and as such, was not consistent with Monsanto's overall program to control and direct product distribution in the relevant market."). Finally, the damages suffered by Florida Seed are not speculative in nature and there is no risk of duplicative recovery or complex apportionment of damages. Florida Seed can quantify the damages resulting from its inability to carry a recognized residential non-selective herbicide in its product mix. R1-1-18. Florida Seed only seeks to recover damages based on Monsanto's actions in preventing Florida Seed from competing in the relevant market.

*The Eleventh Circuit's decision leaves a wrong without a remedy.* As to the "efficient enforcer" prong of the standing analysis, the Eleventh Circuit concluded that "the proper parties to challenge Monsanto's acquisition of Ortho are direct purchasers in the non-selective herbicide

market." (7a). The statement is surprising because at the time of the wrongs complained of, Florida Seed *was* a direct purchaser of Kleenup product. The Eleventh Circuit apparently reasoned that Florida Seed is not now an efficient enforcer of the antitrust laws because Monsanto terminated Florida Seed as a distributor prior to commencement of the instant action. Such a rule would never allow a terminated distributor to be considered an efficient enforcer of the antitrust laws, and would carry with it the added twist that an otherwise proper plaintiff may lose standing solely by virtue of the antitrust violation itself. *But cf. Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) (*former* Monsanto distributor successfully asserted price fixing claim against Monsanto). According to the Eleventh Circuit's decision in this case, the terminated distributor in *Monsanto* never should have been allowed to proceed beyond the threshold issue of antitrust standing.

By limiting the proper plaintiffs to "direct purchasers in the non-selective herbicide market," (7a), the Eleventh Circuit effectively has left a wrong without a remedy and has formulated a rule that is "likely to leave a significant antitrust violation undetected or unremedied." *See Associated General*, 459 U.S. at 542. This is so because ultimate consumers in the non-selective herbicide market will be denied standing as indirect purchasers; and direct purchasing middlemen, who have not been excluded, as Florida Seed was, will have suffered no injury-in-fact. Indeed they will have benefitted from Monsanto's anticompetitive reconfiguration of distribution channels. Even though they ultimately may bear the brunt of supracompetitive prices resulting from Monsanto's weakening of Kleenup, ultimate consumers will be denied federal antitrust standing under this Court's decision in *Illinois Brick* because of concerns over duplicative damages or complex damage apportionment. Perhaps this is why, in the more than three years since this action was commenced, to Petitioners' knowledge no similar or related

antitrust action against Monsanto has been commenced by a "better" plaintiff. As pointed out by Professors Areeda and Hovenkamp, the *Illinois Brick* doctrine would obstruct consumer claims because a court must be concerned that allowing consumers to pursue an action in cases like this one would create serious difficulties in apportioning damages and would result in plaintiffs having little incentive to pursue an antitrust action vigorously. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 371c (rev. ed. 1995).

On the other hand, direct purchasing middlemen who remain in the market will have experienced no injury-in-fact from Monsanto's anticompetitive manipulation of distribution channels. If anything, those remaining distributors will face lessened competition from the weakened Kleenup brand, and will *benefit* from increased concentration at the distributor level. Under current law, such direct purchasers will be denied antitrust standing. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990) ("respondents stand to gain from any conspiracy to raise the market price"); *Caribe BMW Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 753 (1st Cir. 1994). Similarly, Platte, the purchaser of the Kleenup Assets, did not suffer injury-in-fact because it purchased those assets, presumably at fair market value, after Monsanto's anticompetitive actions. In a market exclusion case such as this one, if the excluded middleman is denied standing, the interests of the ultimate consumer will be vindicated by no one.

## CONCLUSION

The errors below raise important questions that warrant clarification by this Court. The Eleventh Circuit has acknowledged the "struggle" of this Court and the lower courts to identify proper plaintiffs in antitrust cases. *See Todorov*, 921 F.2d at 1449 & n.16. This Court likewise has acknowledged a lack of precision in its standing analysis, even comparing that analysis to the elusive judicial search for proximate cause. *See Associated General*, 459 U.S. at 535-36. The decision below, insofar as it is at odds with precedents of this Court as well as other circuits and even the Eleventh Circuit, will contribute to this struggle. Worse yet, however, the decision below may tempt lower federal courts to accept the bright line rule that "distributors who are terminated following a merger suffer no antitrust injury," (6a), and to fashion other equally clear rules to address recurring fact patterns. Such a result may reduce the complexity of the issues facing the lower courts but at the expense of effective and efficient private antitrust enforcement.

Certainly this case has implications beyond its effect on the distribution of weed killers in the residential lawn and garden products market. Because they may involve dangerous aggregations of market power, acquisitions are an extremely sensitive area of antitrust concern. It would be unwise to sanction an antitrust standing rule fashioned around the presumption that post-acquisition manipulation of product distribution channels is always driven by efficiency. Such a rule potentially would allow manufacturers to restrain interbrand competition—as Monsanto did here—by reconfiguring distribution channels to accomplish anticompetitive purposes. Moreover, conduct that is actionable in the absence of an acquisition would cease to be actionable if it follows an acquisition. If efficiency considerations really did motivate Monsanto in this case (and the Complaint alleges otherwise), Monsanto should

prevail on the merits. But to assume the answer to that question and deny standing is simply erroneous.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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